(Billing Code 5001-06-P)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 209, 227, and 252

RIN Number 0750-AG38

Defense Federal Acquisition Regulation Supplement;

Government Support Contractor Access to Technical Data

(DFARS 2009-D031)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD has adopted as final, with changes, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2010 that provides authority for certain types of Government support contractors to have access to proprietary technical data belonging to prime contractors and other third parties, provided that the technical data owner may require the support contractor to execute a non-disclosure agreement having certain restrictions and remedies.

DATES: Effective: **[Insert date of publication in the Federal Register]**.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Gomersall, 571-372-6099.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published an interim rule in the Federal Register at 76 FR 11363 on March 2, 2011, to implement section 821 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111-84), enacted October 28, 2009. Section 821 provides authority for certain types of Government support contractors to have access to proprietary technical data belonging to prime contractors and other third parties, provided that the technical data owner may require the support contractor to execute a non-disclosure agreement having certain restrictions and remedies.

The DFARS scheme for acquiring rights in technical data is based on 10 U.S.C. 2320 and 2321. Section 2320 establishes the basic allocation of rights in technical data, and provides, among other things, that a private party is entitled to restrict the Government's rights to release or disclose privately developed technical data outside the Government. This restriction is implemented in the DFARS as the "limited rights" license, which essentially limits the Government's use of such data only for in-house use and which does not include release to Government support contractors.

Historically, the statutorily based scheme has included only two categorical exceptions to the basic nondisclosure requirements for such privately developed data:

- A "type" exception, in which the Government is granted

unlimited rights in certain types of "top-level" data that are not treated as proprietary (e.g., form, fit, and function data; data necessary for operation, maintenance, installation, or training; publicly available data) (2320(a)(2)(C)); and

- A "special needs" exception for certain important Government activities that are considered critical to Government operations (e.g., emergency repair and overhaul; evaluation by a foreign government), and are allowed only when the recipient of the data is made subject to strict nondisclosure restrictions on any further release of the data. (2320(a)(2)(D))

Section 821 amends 10 U.S.C. 2320 to add a third statutory exception to the prohibition on release of privately developed data outside the Government, allowing a covered Government support contractor access to and use of any technical data delivered under a contract for the sole purpose of furnishing independent and impartial advice or technical assistance directly to the Government in support of the Government's management and oversight of the program or effort to which such technical data relates. The statute also provides a definition of "covered Government support contractor."

Four respondents submitted public comments in response to the interim rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the

rule as a result of those comments are provided as follows:

A. Summary of significant changes

1. DoD has revised DFARS 227.7104(b) and the definition of "Small Business Innovation Research (SBIR) data rights" to clarify the Government's limited rights in technical data and restricted rights in computer software under the SBIR data rights license obtained under the clause at 252.227-7018.

2. DoD has deleted the requirement that the covered Government support contractor provide copies of any non-disclosure agreements (NDAs) executed with proprietary information owners, upon request of the Contracting Officer (see 209.505-4, 252.227-7013(b)(3)(iv)(E), 252.227-7014(b)(3)(iii)(E), 252.227-7015(b)(3)(v), 252.227-7018(b)(8)(v), 252.227-7025(b)(1)(ii)(E), and 252.227-7025(b)(4)(ii)(E)). This is not a statutory requirement, and the benefit to the Government in collecting these copies is outweighed by the administrative burden.

B. Analysis of public comments

1. Non-disclosure agreements (NDAs)

a. Timing of NDA

Comment: Two respondents suggested that proprietary information should not be disclosed to support contractors until after the owner is given notice an NDA is executed. The respondents stated that if the Government allows access to the proprietary information without an NDA in place, then the proprietary information owner "loses the opportunity to enforce its rights" and the covered

Government support contractor would no longer be motivated to enter into an NDA.

DoD Response: A covered Government support contractor may not receive access to proprietary information in the absence of appropriate legally binding non-disclosure obligations. The Government's contract with a covered Government support contractor must always contain the clause at 252.227-7025, which places legally binding use and non-disclosure restrictions on the covered Government support contractor before it has access to any proprietary information. In addition, 252.227-7025(c) expressly confirms that the owner of the proprietary information is a third-party beneficiary of those use and non-disclosure obligations and has a direct cause of action against the covered Government support contractor for any breach of those obligations. Thus, the covered Government support contractor cannot receive any such proprietary information unless and until it is already subject to, at a minimum, the legally binding use and nondisclosure obligations of the clause at 252.227-7025, which also subjects the covered Government support contractor to a direct cause of action by the proprietary information owner.

b. Use and Non-Disclosure Agreement (DFARS 227.7103-7)

Comment: One respondent suggested that in addition to allowing a Contractor to enter an NDA with the covered Government support contractor or to waive its right to an NDA, the contractor should be allowed, alternatively, to require the covered Government

support contractor to execute the Use and Non-Disclosure Agreement in 227.7103-7.

DoD Response: The Use and Non-Disclosure Agreement at 227.7103-7 is an agreement between the Government and a private party, and is used only when the information is being provided to the private party outside of a contract that contains the clause at 252.227-7025. When the receiving party is a covered Government support contractor, then, by definition, the contract under which the information is being provided must contain the clause at 252.227-7025—or else the receiving contractor cannot qualify as a covered Government support contractor and would not be authorized to receive the proprietary information for that contract performance. Thus, in these cases, the clause at 252.227-7025 is already applicable and the NDA at 227.7103-7 is not to be used. Moreover, the 227.7103-7 NDA would be insufficient because it does not address the specialized restrictions for covered Government support contractors—because those restrictions are fully implemented in the clause at 252.227-7025, which must be in the contract in order for the recipient to qualify to receive the information as a covered Government support contractor.

c. Non-disclosure agreements that exceed the terms and conditions of DFARS 252.227-7025

Comment: Two respondents suggested that the requirement, in the NDA between the contractor and the covered Government support contractor, prohibiting any additional terms and conditions over

those present in 252.227-7025 without mutual agreement of the
parties, would cause covered Government support contractors to
"balk" at signing industry standard NDAs which most often include
terms and conditions that are not included in 252.227-7025, and
that the restrictions set forth in the clause "do not make a
legally sufficient document". The respondents suggested removing
the prohibition by providing language allowing additional terms and
conditions.

One respondent also noted that an example of a restriction that
is not included in the clause at 252.227-7025 but that is
"particularly important for enforcement" of the proprietary
information owner's rights, would be a requirement for the covered
Government support contractor to have its employees sign individual
NDAs containing materially similar terms.

DoD Response: Regarding the legal sufficiency and effect of
252.227-7025, that clause unequivocally establishes a legally
sufficient and binding obligation on the recipient of the
information, which expressly includes all of the restrictions
provided in the statutory language, and which expressly affirms
that the proprietary information owner is a third-party beneficiary
of those clause obligations and thereby has a direct cause of
action against the recipient of the proprietary information for any
breach of those obligations. Additionally, the clause at 252.227-
7025 requires that any such direct NDA between the covered
Government support contractor and the proprietary information owner

will "implement" the requirements of the clause at 252.227-7025, which would require, at a minimum, terms and conditions that are necessary to establish a legally sufficient NDA that covers all of the restrictions and obligations contained in the clause at 252.227-7025. Beyond those minimums, the parties are also free to negotiate for any additional terms and conditions by mutual agreement, but neither party can require the other to agree to a term or condition that is outside of those necessary to implement the 252.227-7025 requirements (which fully implement the statutory requirements).

DoD agrees with the respondent's suggestion that it is important to require the covered Government support contractor to ensure that its employees are subject to appropriate non-disclosure obligations, and observes that the obligations on the recipient contractor in the clause at 252.227-7025 do, in fact, create an obligation for that contractor to ensure that it implements the use and nondisclosure restrictions appropriately in the performance of its contractual duties, which would necessarily include ensuring that its employees who will have access or use of the proprietary information are subject to the applicable use and nondisclosure restrictions. However, to the extent that this may be viewed as an implicit obligation of the clause at 252.227-7025, and thus potentially could be overlooked or less than fully understood, such ambiguity must be eliminated. Accordingly, DoD has added a new paragraph (d) to 252.227-7025 to explicitly require the recipient

contractor to ensure that its employees are subject to use and non-disclosure obligations prior to the employees being provided access to or use of the proprietary information.

d. Performance Assessments and Root Cause Analysis (PARCA) activities

Comment: One respondent suggested that DoD's Performance Assessments and Root Cause Analysis (PARCA) activities related to utilizing a "master NDA" between the Government and support contractors to cover third-party proprietary earned value management data (wherein the data owner is a third-party beneficiary of the master NDA) may be inconsistent with the approach in this rule (i.e., which provides for individual "direct" NDAs between the support contractor and the proprietary information owner), and recommends internal DoD coordination to eliminate inconsistencies. The respondent acknowledged that although such earned value management data largely involves "proprietary financial, business, and contract performance data and not Limited Rights Technical Data or Restricted Rights Software, it would be most beneficial to ensure consistency in the processes for disclosing both types of data."

DoD Response: This rule requires the use of the clause at 252.227-7025 with all covered Government support contractors, which serves as a form of "master NDA" between the Government and the support contractor, in which the proprietary information owner is a third-party beneficiary of that NDA and thereby has a

direct cause of action against the support contractor for any
breach of the NDA requirements. However, as noted by the
respondent, earned value management data does not include limited
rights technical data or restricted rights computer software, and
thus the PARCA efforts are outside the scope of this rule, as
well as the underlying statutory obligations regarding a direct
NDA between a covered Government support contractor and the
proprietary information owner.

2. Notification requirements

Comment: One respondent suggested that a covered Government
support contractor should be obligated to notify the proprietary
information owner upon first access to the proprietary information
and annually thereafter.

DoD Response: The interim rule placed a direct obligation on
the covered Government support contractor to notify the proprietary
information owner upon first access to the proprietary information.

DoD has added at 252.227-7025(b)(5)(iii) a requirement to
provide a thirty (30) day period within which the covered
Government support contractor must notify the Contractor of the
release or disclosure of the Contractor's limited rights data to
the covered Government support contractor. The thirty (30) day
period will provide a reasonable time for notification.

The recommended annual notification requirement would place an
onerous administrative burden on the covered Government support
contractor. Accordingly, the final rule does not require an annual

notification.

3. Use and release conditions

Comment: One respondent suggested that the use and release conditions that a covered Government support contractor must agree to, as set forth in 10 U.S.C. 2320 (f)(2)(A)-(E), be added to the definition of "covered Government support contractor" at 252.227-7013(a)(5)(ii), 252.227-7014(a)(6)(ii), 252.227-7015(a)(2)(ii), and 252.227-7018(a)(6)(ii).

DoD Response: These conditions are present in, and applied to all covered Government support contractors, at paragraph (b)(5) of 252.227-7025, which is a required clause for all contracts when it is anticipated that the Government will provide the contractor, for performance of its contract, technical data marked with another contractor's restrictive legend(s) (see clause prescriptions at 227.7103-6 (c), 227.7104(f)(1) and 227.7203-6(d)). A support contractor cannot qualify as a covered Government support contractor unless it meets the definition of a "covered Government support contractor," which requires that the clause at 252.227-7025 be included in the covered Government support contractor's contract and thereby applies all of the cited restrictions to the covered Government support contractor's use of the relevant data or software to perform that contract. This structure was used to include the substance of the applicable use and release conditions within the clause that serves to apply the restrictions to contractors of any and all types, including covered Government

support contractors that are receiving such Government-furnished information (GFI). Thus, these restrictions are included in the definition of "covered Government support contractor" by cross-reference.

4. Access and use restrictions

a. Clarification

Comment: One respondent suggested that the rule should clarify the access and use restrictions on a covered Government support contractor by expressly citing the statutory purpose limitation of "for the sole purpose of furnishing independent and impartial advice or technical assistance directly to the Government in support of the Government's management and oversight of the program or effort to which such [proprietary information] relates" in the definitions of "limited rights" and "restricted rights" at DFARS 252.227-7013(a)(14)(i)(B)(*1*), 252.227-7014(a)(15)(vii), -7018(a)(15)(i)(B)(*1*), and 252.227-7018(a)(18)(vii), and in the corresponding limitations on the covered Government support contractor's access and use of such information at 252.227-7025(b)(5)(i).

DoD Response: The statutory purpose restrictions on the covered Government support contractor's access and use of such proprietary information are expressly incorporated at 252.227-7025(b)(5)(i) into the access and use restrictions on a covered Government support contractor for limited rights technical data and restricted rights computer software, and also for technical data related to

commercial items.

However, DoD has clarified the definitions of "limited rights" and "restricted rights" to specify that the Government's authorized release to a covered Government support contractor is in the performance of a covered Government support contract (which necessarily contains the clause at 252.227-7025). Thus no further revisions are necessary. This structure was used to include the substance of the applicable use and release conditions within the clause that serves to apply the restrictions to the covered Government support contractors.

b. Covered Government support contractors' "access and use" of proprietary data

Comment: One respondent noted that the statute authorizes covered Government support contractors only to "access and use" the third party proprietary data, and suggested the deletion of the additional terms "modify, reproduce, perform, display, release or disclose" (or corresponding terms "modification, reproduction, performance, display, release or disclose") in several sections of the rule (e.g., 252.227-7013(a)(14)(i)(B)(*1*), 252.227-7014(a)(15)(vii), 252.227-7018(a)(15)(i)(B)(*1*) and (a)(18)(vii), and 252.227-7025(b)(4)(ii)(A)).

DoD Response: Independently of the subject matter of this rule, the statutory language at 10 U.S.C. 2320 and 2321 refer to a limited set of regulated activities relating to technical data (e.g., "use" and "release") However, in the detailed

implementation of the statutory scheme, the DFARS utilizes a more complete set of verbs (e.g., "use, modify, reproduce, modify, perform, display, release or disclose") to ensure that all relevant activities are covered, including recognizing the inherent elements of a generic "use" that are expressly distinguished in the U.S. copyright laws (see, e.g., 17 U.S.C. 106). The rule uses this more complete and detailed set of verbs to be consistent with long-standing conventions in implementing these statutory requirements. In addition, all of the covered activities are subject to the numerous restrictions and safeguards that are implemented to protect the interests of the owner of the proprietary data.

5. Authorized person.

Comment: Two respondents noted that in the definitions of "limited rights" and "restricted rights" the covered Government support contractor is authorized to release the proprietary information to an "authorized person" in performing the covered Government support contractor's contract (see DFARS 252.227-7013(a)(14)(i)(B)(*1*), 252.227-7014(a)(15)(vii) and 252.227-7018(a)(15)(i)(B)(*1*)). The respondents suggested that the term "authorized person" be defined to "limit the support contractor's right to release or disclose --- to within the support contractor's organization, and only for the performance of the support contract" or "only to the Government, the contractor that owns the proprietary data, or parties the support contractor has confirmed have entered a non-disclosure agreement, license, subcontract, or

other agreement giving the owning parties' permission for such disclosure."

DoD Response: To make the reference to "authorized person" more clear, DoD has replaced the reference to an "authorized person" that was used in the interim rule definitions of "limited rights" and "restricted rights" with the more definitive and accurate phrases "a person authorized to receive limited rights technical data" and "a person authorized to receive restricted rights computer software," respectively.

6. Definition of "restricted rights"

Comment: One respondent noted that the rule makes revisions to the coverage for restricted rights noncommercial computer software that are analogous to the revisions for limited rights technical data, but recommends revisions to recognize certain important differences between restricted rights computer software and limited rights technical data (e.g., that the Government's rights to use and reproduce restricted rights software are proscribed differently and to a greater extent than for limited rights technical data). The respondent recommends revisions to ensure that the covered Government support contractor's authorized use of restricted rights software is subject to all of the restrictions that apply to the Government's use (while retaining the additional restrictions that further restrict the covered Government support contractor's activities).

DoD Response: DoD has revised the definition of "restricted

rights" to address the concerns raised by the respondent, ensuring that the covered Government support contractor's authorized uses are no greater than the uses authorized for the Government (see 252.227-7014(a)(15)(v)(D), (vi)(C), and (vii); and 252.227-7018(a)(18)(iv)(B), (v)(D), (vi)(C), and (vii)).

7. Covered Government support contractor organizational conflict of interest

Comment: One respondent noted that the rule covers situations in which a covered Government support contractor could be in competition with a contractor-owner of proprietary data by prohibiting the support contractor from using that data to compete for any contracts, but this does not cover a support contractor that may not be considered to be in competition, but that would have access to such proprietary information in the course of advising the Government on overall acquisition strategies. The respondent recommends that the rule be revised to specifically prohibit such a support contractor from using the data to advise the Government on acquisition strategies or overall strategies in way that would benefit the support contractor.

One respondent commented that the interim rule seemed to conflict with DoD guidance regarding organizational conflicts of interest, observing that one part of a large defense contractor might provide Government support contracting services thus creating opportunities for that contractor to obtain proprietary data of competitors. The respondent stated that only in limited

circumstances on a case-by-case basis should support contractors be looking at proprietary information from other contractors and noted that a more appropriate solution might be to reduce DoD dependence on contractors.

DoD Response: Independently of this rule, the organizational conflict of interest rules restrict a support contractor, including a covered Government support contractor, from advising the Government on acquisition strategies or overall strategies, or any other matter, in which the support contractor would have a financial or other interest (i.e., that would qualify as an organizational conflict of interest). Those prohibitions and restrictions apply regardless of whether the advising support contractor would have access to any third party proprietary data in the course of such advising. This rule supplements those existing organizational conflict of interest restrictions by adding layers of restriction, and additional safeguards, to ensure that any covered Government support contractor's access to a third party proprietary data does not result in any competitive harm to the third party data owner.

The rule implements the statutory prohibition against covered Government support contractors having affiliations with the prime and first-tier subs, or any direct competitor of the prime or such first-tier sub and reflects the policy determinations inherent in the statute. Alteration of DoD policy regarding the extent of DoD reliance on contractors is beyond the scope of rulemaking for this

statutory implementation.

8. Lower-tier subcontractor affiliations

Comment: One respondent commented that the definition of "covered Government support contractor" is limited to preclude affiliation only with the prime and first-tier subcontractors on the relevant program(s), and suggested that support contractors that are not covered by the rule can have affiliations to lower-tier subcontractors and would not be subject to the requirement to sign the direct NDA. The respondent suggested that the rule should be amended to bring such support contractors under the requirement to sign the direct NDA.

DoD Response: The prohibition against covered Government support contractors having affiliations with the prime and first-tier subcontractors is a substantive limitation from the statutory definition of "covered Government support contractor." Changing the scope of the definition to prohibit affiliations at lower tiers would narrow the scope of the definition of "covered Government support contractor" in a manner that is inconsistent with the statute. The statutory scheme permits affiliations at lower tiers, but established numerous restrictions and protections to ensure that the covered Government support contractor's access to proprietary information does not result in competitive harm. This scheme is reinforced in all cases by the rules and restrictions against organizational conflicts of interest. Thus, a support contractor with affiliations at lower tiers may still qualify as a

covered Government support contractor if it meets all other
definitional criteria (see 252.227-7013(a)(5), 252.227-7014(a)(6),
252.227-7015(a)(2), and 252.227-7018(a)(6)), but in all such cases
the covered Government support contractor would be subject to the
obligations regarding direct NDAs (see 252.227-7025(b)(1)(ii)(D),
(b)(4)(ii)(D), and (d)). If a support contractor is not covered by
the rule (i.e., does not meet the definition of "covered Government
support contractor"), then that support contractor would not be
subject to that direct NDA requirement, but that is because the
support contractor would not be authorized to receive the
proprietary information as a covered Government support contractor
in the first place. It is impossible under this rule for a covered
Government support contractor to be authorized to receive such
proprietary information and not to be subject to the obligations
regarding direct NDAs.

9. DFARS coverage at 209.5

Comment: One respondent commented that it was not clear if the
language of DFARS 209.505-4(b) of the interim rule was meant to be
a replacement or supplement for FAR 9.505-4(b). The respondent
also commented that DFARS 209.505-4(b) covers all proprietary
information, whereas the revisions to 10 U.S.C. 2320 cover only
technical data and the proposed revisions cover both cases.

DoD Response: The DFARS text at 209.505-4(b) addresses DoD-
specific requirements and procedures applicable only to third
party proprietary technical data and computer software being

accessed by DoD contractors, including covered Government support
contractors, which provides specific coverage for a subset of the
more generic coverage in the FAR. In DoD, the unmodified FAR
coverage still applies to DoD contractors accessing other types
of proprietary information in the performance of their contracts.
The numbering is consistent with DFARS drafting conventions.

10. Commercial restrictive legend

Comment: With respect to DFARS 252.227-7025(b)(4)(i), one
respondent commented that there is no requirement for a commercial
restrictive legend in 10 U.S.C. 2320 or DFARS 252.227-7015, nor is
that term defined in the interim rule. The respondent suggested
deletion of all references to a commercial restrictive legend.

DoD Response: It is correct that neither 10 U.S.C. 2320 nor
DFARS 252.227-7015 provides the specific form, content, or format
for a restrictive legend on technical data related to commercial
items (or technical data that is a commercial item). However, in
accordance with 252.227-7015(d), the Government, and other persons
to whom the Government may have released or disclosed technical
data delivered or otherwise furnished under a contract, shall have
no liability for any release or disclosure of technical data that
are not "marked to indicate that such data are licensed data
subject to use, modification, reproduction, release, performance,
display, or disclosure restrictions." In addition, although not
included as a separate definition in the paragraph (a) definitions
section of the clause at 252.227-7025, the reference to "commercial

restrictive legend" is defined parenthetically at 252.227-7025(b)(4)(i) as "(i.e., marked to indicate that such data are subject to use, modification, reproduction, release, performance, display, or disclosure restrictions)."

11. Technical correction.

Comment: One respondent commented that in the interim rule, the definitions of "limited rights," "restricted rights," and "government purpose rights" were renumbered in DFARS 252.227-7013(a) and 252.227-7014(a), but the renumbering was not accommodated in 252.227-7013(b)(4) and 252.227-7014(b)(4) in an apparent drafting error. This had the effect of making government purpose rights the minimum rights that must be provided to the Government in Specially Negotiated License Rights.

DoD Response: The respondent is correct. DoD issued a technical amendment on February 24, 2012, to correct the text of 252.227-7013(b)(4) and (b)(6), and 252.227-7014(b)(4) and (b)(6) to refer respectively to 252.227-7013(a)(14) (limited rights) and 252.227-7014(a)(15) (restricted rights) (see 77 FR 10976). DoD also corrected paragraph references in 252.227-7013(b)(2)(i)(A).

B. Other changes

1. Conforming changes are made to paragraphs (b)(20), (b)(21), (c)(2) and (c)(3) of the clause at 252.212-7001, "Contract Terms and Conditions Required to Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial

Items," to update the cross-references to the clauses modified by this final rule.

2. 252.227-7025(b)(1)(ii) and 252.227-7025(b)(4)(ii) now reference a new paragraph (b)(5), to avoid repetition of the restrictions in each location. The restrictions regarding GFI marked with limited or restricted rights legends and GFI marked with commercial restrictive legends respectively are revised for clarity.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review by the Office of Information and Regulatory Affairs under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD has prepared a final regulatory flexibility analysis consistent with 5 U.S.C. 603. A copy of the analysis may be

obtained from the point of contact specified herein. The
analysis is summarized as follows:

   This rule amends the Defense Federal Acquisition Regulation
Supplement DFARS) to implement section 821 of the National
Defense Authorization Act for Fiscal Year 2010. Section 821
provides authority for certain types of Government support
contractors to have access to proprietary technical data
belonging to prime contractors and other third parties, provided
that the technical data owner may require the support contractor
to execute a non-disclosure agreement having certain restrictions
and remedies.

   No public comments were received in response to the initial
regulatory flexibility analysis.

   No comments were received from the Chief Counsel for Advocacy
of the Small Business Administration in response to the rule.
The rule affects small businesses that are Government support
contractors that need access to proprietary technical data or
computer software belonging to prime contractors and other third
parties. It will also affect any small business that is the
owner of "limited rights" technical data or restricted rights
computer software in the possession of the Government to which
the support contractor will require access.

   The rule imposes no reporting, recordkeeping, or other
information collection requirements. However, the statute
provides that the support contractor must be willing to sign a

nondisclosure agreement with the owner of the data. The rule has
implemented this requirement in a way that preserves maximum
flexibility for the private parties to reach mutual agreement
without unnecessary interference from the Government. To reduce
burdens, the rule permits the owner of the data to waive the
requirement for a nondisclosure agreement, since the Government
clauses already adequately deal with non-disclosure. Further,
the rule provides that the support contractors cannot be required
to agree to any conditions not required by statute. In the final
rule, DoD has deleted the requirement to provide a copy of the
non-disclosure agreement or waiver to the contracting officer,
upon request.

Other than the alternatives already addressed, there are no
known significant alternatives to the rule that would meet the
requirements of the statute and minimize any significant economic
impact of the rule on small entities. The impact of this rule on
small business is not expected to be significant because the
execution of a non-disclosure agreement is not likely to have a
significant cost or administrative impact.

V. Paperwork Reduction Act

The rule imposes no new reporting, recordkeeping, or other
information collection requirements. DFARS clauses 252.227-7013,
252.227-7014, 252.227-7015, and 252.227-7025 contain reporting or
recordkeeping requirements that require the approval of the
Office of Management and Budget under 44 U.S.C. chapter 35.

However, these clauses are already covered by an approved OMB control number 0704-0369 in the amount of approximately 1.76 million hours.

List of Subjects in 48 CFR Parts 209, 227, and 252

Government procurement.

Kortnee Stewart

Editor, Defense Acquisition Regulations System

Therefore, DoD amends 48 CFR parts 209, 227, and 252 as follows:

1. The authority citation for parts 209 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR Chapter 1.

PART 209—CONTRACTOR QUALIFICATIONS

2. Section 209.505-4 is revised to read as follows:

209.505-4 Obtaining access to proprietary information.

(b) For contractors accessing third party proprietary technical data or computer software, non-disclosure requirements are addressed at 227.7103-7(b), through use of the clause at 252.227-7025 as prescribed at 227.7103-6(c) and 227.7203-6(d). Pursuant to that clause, covered Government support contractors may be required to enter into non-disclosure agreements directly with the third party asserting restrictions on limited rights

technical data, commercial technical data, or restricted rights computer software. The contracting officer is not required to obtain copies of these agreements or to ensure that they are properly executed.

PART 227—PATENTS, DATA, AND COPYRIGHTS

3. The authority citation for Part 227 is amended by removing citation "41 U.S.C. 421 and 48 CFR Chapter 1" and adding citation "41 U.S.C. 1303 and 48 CFR Chapter 1" in its place.

227.7103-5 [Amended]

4. Section 227.7103-5 paragraph (c)(2) is amended by inserting a comma after the word "release".

5. Section 227.7104 is amended by revising paragraph (b) and (c) to read as follows:

227.7104   Contracts under the Small Business Innovation Research (SBIR) Program.

(a) * * *

(b) Under the clause at 252.227-7018, the Government obtains SBIR data rights in technical data and computer software generated under the contract and marked with the SBIR data rights legend. SBIR data rights provide the Government limited rights in such technical data and restricted rights in such computer software during the SBIR data protection period commencing with contract award and ending five years after completion of the project under which the data were generated. Upon expiration of

the five-year restrictive license, the Government has unlimited rights in the SBIR technical data and computer software.

(c) During the SBIR data protection period, the Government may not release or disclose SBIR technical data or computer software to any person except as authorized for limited rights technical data or restricted rights computer software, respectively.

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.212-7001 [Amended]

6. Section 252.212-7001 is amended—

a. By removing the clause date "(FEB 2013)" and adding "(MAY 2013)" in its place;

b. In paragraph (b)(20), by removing the clause date "(FEB 2012)" and adding "(MAY 2013)" in its place;

c. In paragraph (b)(21), by removing the clause date "(DEC 2011)" and adding "(MAY 2013)" in its place;

d. In paragraph (c)(2,) by removing the clause date "(FEB 2012)" and adding "(MAY 2013)" in its place; and

e. In paragraph (c)(3,) by removing the clause date "(DEC 2011)" and adding "(MAY 2013)" in its place.

252.227-7013 [Amended]

7. Section 252.227-7013 is amended—

a. By removing the clause date "(FEB 2012)" and adding "(MAY 2013)" in its place;

b. By revising paragraph (a)(14)(i)(B)(1); and (b)(3)(iv) to read as follows:

252.227-7013 Rights in Technical Data—Noncommercial Items.

* * * * *

(a) * * *

(14) * * *

(i) * * *

(B) A release or disclosure to—

(*1*) A covered Government support contractor in performance of its covered Government support contract for use, modification, reproduction, performance, display, or release or disclosure to a person authorized to receive limited rights technical data; or

* * * * *

(b) * * *

(3) * * *

(iv) The Contractor acknowledges that—

(A) Limited rights data are authorized to be released or disclosed to covered Government support contractors;

(B) The Contractor will be notified of such release or disclosure;

(C) The Contractor (or the party asserting restrictions as identified in the limited rights legend) may require each such covered Government support contractor to enter into a non-disclosure agreement directly with the Contractor (or the party asserting restrictions) regarding the covered Government support

contractor's use of such data, or alternatively, that the Contractor (or party asserting restrictions) may waive in writing the requirement for a non-disclosure agreement; and

(D) Any such non-disclosure agreement shall address the restrictions on the covered Government support contractor's use of the limited rights data as set forth in the clause at 252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends. The non-disclosure agreement shall not include any additional terms and conditions unless mutually agreed to by the parties to the non-disclosure agreement.

* * * * *

252.227-7014 [Amended]

8. Section 252.227-7014 is amended—

a. By removing the clause date "(FEB 2012)" and adding "(MAY 2013)" in its place;

b. By revising paragraph (a)(15); and (a)(16)(b)(iii) to read as follows:

252.227-7014 Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation.

* * * * *

(a) * * *

(15) "Restricted rights" apply only to noncommercial computer software and mean the Government's rights to—

(i) Use a computer program with one computer at one time. The program may not be accessed by more than one terminal or central processing unit or time shared unless otherwise permitted by this contract;

(ii) Transfer a computer program to another Government agency without the further permission of the Contractor if the transferor destroys all copies of the program and related computer software documentation in its possession and notifies the licensor of the transfer. Transferred programs remain subject to the provisions of this clause;

(iii) Make the minimum number of copies of the computer software required for safekeeping (archive), backup, or modification purposes;

(iv) Modify computer software provided that the Government may—

(A) Use the modified software only as provided in paragraphs (a)(15)(i) and (iii) of this clause; and

(B) Not release or disclose the modified software except as provided in paragraphs (a)(15)(ii), (v), (vi) and (vii) of this clause;

(v) Permit contractors or subcontractors performing service contracts (see 37.101 of the Federal Acquisition Regulation) in support of this or a related contract to use computer software to diagnose and correct deficiencies in a computer program, to modify computer software to enable a computer program to be combined with,

adapted to, or merged with other computer programs or when necessary to respond to urgent tactical situations, provided that—

(A) The Government notifies the party which has granted restricted rights that a release or disclosure to particular contractors or subcontractors was made;

(B) Such contractors or subcontractors are subject to the use and non-disclosure agreement at 227.7103-7 of the Defense Federal Acquisition Regulation Supplement (DFARS) or are Government contractors receiving access to the software for performance of a Government contract that contains the clause at DFARS 252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends;

(C) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(15)(iv) of this clause, for any other purpose; and

(D) Such use is subject to the limitations in paragraphs (a)(15)(i) through (iii) of this clause;

(vi) Permit contractors or subcontractors performing emergency repairs or overhaul of items or components of items procured under this or a related contract to use the computer software when necessary to perform the repairs or overhaul, or to modify the computer software to reflect the repairs or overhaul made, provided that—

(A) The intended recipient is subject to the use and non-disclosure agreement at DFARS 227.7103-7 or is a Government contractor receiving access to the software for performance of a Government contract that contains the clause at DFARS 252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends;

(B) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(15)(iv) of this clause, for any other purpose; and

(C) Such use is subject to the limitations in paragraphs (a)(15)(i) through (iii) of this clause; and

(vii) Permit covered Government support contractors in the performance of covered Government support contracts that contain the clause at 252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends, to use, modify, reproduce, perform, display, or release or disclose the computer software to a person authorized to receive restricted rights computer software, provided that—

(A) The Government shall not permit the covered Government support contractor to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(15)(iv) of this clause, for any other purpose; and

(B)   Such use is subject to the limitations in paragraphs (a)(15)(i) through (iv) of this clause.

(16) * * *

(b) * * *

(3) * * *

(iii)   The Contractor acknowledges that—

(A)   Restricted rights computer software is authorized to be released or disclosed to covered Government support contractors;

(B)   The Contractor will be notified of such release or disclosure;

(C)   The Contractor (or the party asserting restrictions, as identified in the restricted rights legend) may require each such covered Government support contractor to enter into a non-disclosure agreement directly with the Contractor (or the party asserting restrictions) regarding the covered Government support contractor's use of such software, or alternatively, that the Contractor (or party asserting restrictions) may waive in writing the requirement for a non-disclosure agreement; and

(D)   Any such non-disclosure agreement shall address the restrictions on the covered Government support contractor's use of the restricted rights software as set forth in the clause at 252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.   The non-disclosure agreement shall not include any additional terms and

conditions unless mutually agreed to by the parties to the non-disclosure agreement.

* * * * *

9. Section 252.227-7015 is amended—

a. By removing the clause date "(DEC 2011)" and adding "(MAY 2013)" in its place;

b. By revising paragraph (b)(3) to read as follows:

252.227-7015 Technical Data—Commercial Items.

* * * * *

(b) * * *

(3) The Contractor acknowledges that—

(i) Technical data covered by paragraph (b)(2) of this clause are authorized to be released or disclosed to covered Government support contractors;

(ii) The Contractor will be notified of such release or disclosure;

(iii) The Contractor (or the party asserting restrictions as identified in a restrictive legend) may require each such covered Government support contractor to enter into a non-disclosure agreement directly with the Contractor (or the party asserting restrictions) regarding the covered Government support contractor's use of such data, or alternatively, that the Contractor (or party asserting restrictions) may waive in writing the requirement for an non-disclosure agreement; and

(iv) Any such non-disclosure agreement shall address the restrictions on the covered Government support contractor's use of the data as set forth in the clause at 252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends. The non-disclosure agreement shall not include any additional terms and conditions unless mutually agreed to by the parties to the non-disclosure agreement.

* * * * *

10. Section 252.227-7018 is amended—

a. By removing the clause date "(MAR 2011)" and adding "(MAY 2013)" in its place;

b. By revising paragraphs (a)(15); (a)(18); (a)(19); (b)(4); (b)(5); and (b)(8) to read as follows:

252.227-7018 Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program.

(a) * * *

(15) "Limited rights" means the rights to use, modify, reproduce, release, perform, display, or disclose technical data, in whole or in part, within the Government. The Government may not, without the written permission of the party asserting limited rights, release or disclose the technical data outside the Government, use the technical data for manufacture, or authorize the technical data to be used by another party, except that the Government may reproduce, release, or disclose such data or

authorize the use or reproduction of the data by persons outside the Government if—

(i) The reproduction, release, disclosure, or use is—

(A) Necessary for emergency repair and overhaul; or

(B) A release or disclosure to—

(*1*) A covered Government support contractor in performance of its covered Government support contracts for use, modification, reproduction, performance, display, or release or disclosure to a person authorized to receive limited rights technical data; or

(*2*) A foreign government, of technical data other than detailed manufacturing or process data, when use of such data by the foreign government is in the interest of the Government and is required for evaluational or informational purposes;

(ii) The recipient of the technical data is subject to a prohibition on the further reproduction, release, disclosure, or use of the technical data; and

(iii) The contractor or subcontractor asserting the restriction is notified of such reproduction, release, disclosure, or use.

* * * * *

(18) "Restricted rights" apply only to noncommercial computer software and mean the Government's rights to—

(i) Use a computer program with one computer at one time. The program may not be accessed by more than one terminal or central processing unit or time shared unless otherwise permitted by this contract;

(ii)   Transfer a computer program to another Government agency without the further permission of the Contractor if the transferor destroys all copies of the program and related computer software documentation in its possession and notifies the licensor of the transfer.   Transferred programs remain subject to the provisions of this clause;

(iii)   Make the minimum number of copies of the computer software required for safekeeping (archive), backup, or modification purposes;

(iv)   Modify computer software provided that the Government may—

(A)   Use the modified software only as provided in paragraphs (a)(18)(i) and (iii) of this clause; and

(B)   Not release or disclose the modified software except as provided in paragraphs (a)(18)(ii), (v), (vi), and (vii) of this clause;

(v)   Permit contractors or subcontractors performing service contracts (see 37.101 of the Federal Acquisition Regulation) in support of this or a related contract to use computer software to diagnose and correct deficiencies in a computer program, to modify computer software to enable a computer program to be combined with, adapted to, or merged with other computer programs or when necessary to respond to urgent tactical situations, provided that—

(A)   The Government notifies the party which has granted restricted rights that a release or disclosure to particular contractors or subcontractors was made;

(B)   Such contractors or subcontractors are subject to the non-disclosure agreement at 227.7103-7 of the Defense Federal Acquisition Regulation Supplement or are Government contractors receiving access to the software for performance of a Government contract that contains the clause at 252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends;

(C)   The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(18)(iv) of this clause, for any other purpose; and

(D)   Such use is subject to the limitations in paragraphs (a)(18)(i) through (iii) of this clause;

(vi)   Permit contractors or subcontractors performing emergency repairs or overhaul of items or components of items procured under this or a related contract to use the computer software when necessary to perform the repairs or overhaul, or to modify the computer software to reflect the repairs or overhaul made, provided that—

(A)   The intended recipient is subject to the non-disclosure agreement at 227.7103-7 or is a Government contractor receiving access to the software for performance of a Government contract that contains the clause at 252.227-7025, Limitations on the Use

or Disclosure of Government Furnished Information Marked with Restrictive Legends;

(B) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(18)(iv) of this clause, for any other purpose; and

(C) Such use is subject to the limitations in paragraphs (a)(18)(i) through (iii) of this clause; and

(vii) Permit covered Government support contractors in the performance of Government contracts that contain the clause at 252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends, to use, modify, reproduce, perform, display, or release or disclose the computer software to a person authorized to receive restricted rights computer software, provided that—

(A) The Government shall not permit the covered Government support contractor to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(18)(iv) of this clause, for any other purpose; and

(B) Such use is subject to the limitations in paragraphs (a)(18)(i) through (iv) of this clause.

(19) "SBIR data rights" means the Government's rights during the SBIR data protection period (specified in paragraph (b)(4) of

this clause) to use, modify, reproduce, release, perform, display,

or disclose technical data or computer software generated a SBIR

award as follows:

  (i) Limited rights in such SBIR technical data; and

  (ii) Restricted rights in such SBIR computer software.

* * * * *

  (b) * * *

  (4) *SBIR data rights*. Except for technical data, including

computer software documentation, or computer software in which the

Government has unlimited rights under paragraph (b)(1) of this

clause, the Government shall have SBIR data rights in all technical

data or computer software generated under this contract during the

period commencing with contract award and ending upon the date five

years after completion of the project from which such data were

generated.

  (5) Specifically negotiated license rights. The standard

license rights granted to the Government under paragraphs (b)(1)

through (b)(4) of this clause may be modified by mutual agreement

to provide such rights as the parties consider appropriate but

shall not provide the Government lesser rights in technical data,

including computer software documentation, than are enumerated in

paragraph (a)(15) of this clause or lesser rights in computer

software than are enumerated in paragraph (a)(18) of this clause.

Any rights so negotiated shall be identified in a license agreement

made part of this contract.

(6) * * *

(7) * * *

(8) *Covered Government support contractors*. The Contractor acknowledges that—

(i) Limited rights technical data and restricted rights computer software are authorized to be released or disclosed to covered Government support contractors;

(ii) The Contractor will be notified of such release or disclosure;

(iii) The Contractor may require each such covered Government support contractor to enter into a non-disclosure agreement directly with the Contractor (or the party asserting restrictions as identified in a restrictive legend) regarding the covered Government support contractor's use of such data or software, or alternatively that the Contractor (or party asserting restrictions) may waive in writing the requirement for a non-disclosure agreement; and

(iv) Any such non-disclosure agreement shall address the restrictions on the covered Government support contractor's use of the data or software as set forth in the clause at 252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends. The non-disclosure agreement shall not include any additional terms and conditions unless mutually agreed to by the parties to the non-disclosure agreement.

* * * * *

252.227-7025 [Amended]

   11. Section 252.227-7025 is revised as follows:

252.227-7025 Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

   As prescribed in 227.7103-6(c), 227.7104(f)(1), or 227.7203-6(d), use the following clause:

LIMITATIONS ON THE USE OR DISCLOSURE OF GOVERNMENT-FURNISHED INFORMATION MARKED WITH RESTRICTIVE LEGENDS (MAY 2013)

   (a)(1) For contracts in which the Government will furnish the Contractor with technical data, the terms "covered Government support contractor," "limited rights," and "Government purpose rights" are defined in the clause at 252.227-7013, Rights in Technical Data–Noncommercial Items.

   (2) For contracts in which the Government will furnish the Contractor with computer software or computer software documentation, the terms "covered Government support contractor," "government purpose rights," and "restricted rights" are defined in the clause at 252.227-7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation.

   (3) For Small Business Innovation Research program contracts, the terms "covered Government support contractor," "limited rights," "restricted rights," and "SBIR data rights" are defined in the clause at 252.227-7018, Rights in Noncommercial Technical Data

and Computer Software—Small Business Innovation Research (SBIR) Program.

(b) Technical data or computer software provided to the Contractor as Government-furnished information (GFI) under this contract may be subject to restrictions on use, modification, reproduction, release, performance, display, or further disclosure.

(1) *GFI marked with limited rights, restricted rights, or SBIR data rights legends.*

(i) The Contractor shall use, modify, reproduce, perform, or display technical data received from the Government with limited rights legends, computer software received with restricted rights legends, or SBIR technical data or computer software received with SBIR data rights legends (during the SBIR data protection period) only in the performance of this contract. The Contractor shall not, without the express written permission of the party whose name appears in the legend, release or disclose such data or software to any unauthorized person.

(ii) If the Contractor is a covered Government support contractor, the Contractor is also subject to the additional terms and conditions at paragraph (b)(5) of this clause

(2) *GFI marked with government purpose rights legends.* The Contractor shall use technical data or computer software received from the Government with government purpose rights legends for government purposes only. The Contractor shall not, without the express written permission of the party whose name appears in the

restrictive legend, use, modify, reproduce, release, perform, or display such data or software for any commercial purpose or disclose such data or software to a person other than its subcontractors, suppliers, or prospective subcontractors or suppliers, who require the data or software to submit offers for, or perform, contracts under this contract. Prior to disclosing the data or software, the Contractor shall require the persons to whom disclosure will be made to complete and sign the non-disclosure agreement at 227.7103-7.

(3) *GFI marked with specially negotiated license rights legends*.

(i) The Contractor shall use, modify, reproduce, release, perform, or display technical data or computer software received from the Government with specially negotiated license legends only as permitted in the license. Such data or software may not be released or disclosed to other persons unless permitted by the license and, prior to release or disclosure, the intended recipient has completed the non-disclosure agreement at 227.7103-7. The Contractor shall modify paragraph (1)(c) of the non-disclosure agreement to reflect the recipient's obligations regarding use, modification, reproduction, release, performance, display, and disclosure of the data or software.

(ii) If the Contractor is a covered Government support contractor, the Contractor may also be subject to some or all of the additional terms and conditions at paragraph (b)(5) of this

clause, to the extent such terms and conditions are required by the specially negotiated license.

(4) *GFI technical data marked with commercial restrictive legends*.

(i) The Contractor shall use, modify, reproduce, perform, or display technical data that is or pertains to a commercial item and is received from the Government with a commercial restrictive legend (i.e., marked to indicate that such data are subject to use, modification, reproduction, release, performance, display, or disclosure restrictions) only in the performance of this contract. The Contractor shall not, without the express written permission of the party whose name appears in the legend, use the technical data to manufacture additional quantities of the commercial items, or release or disclose such data to any unauthorized person.

(ii) If the Contractor is a covered Government support contractor, the Contractor is also subject to the additional terms and conditions at paragraph (b)(5) of this clause

(5) *Covered Government support contractors.* If the Contractor is a covered Government support contractor receiving technical data or computer software marked with restrictive legends pursuant to paragraphs (b)(1)(ii), (b)(3)(ii), or (b)(4)(ii) of this clause, the Contractor further agrees and acknowledges that—

(i) The technical data or computer software will be accessed and used for the sole purpose of furnishing independent and impartial advice or technical assistance directly to the Government

in support of the Government's management and oversight of the program or effort to which such technical data or computer software relates, as stated in this contract, and shall not be used to compete for any Government or non-Government contract;

(ii) The Contractor will take all reasonable steps to protect the technical data or computer software against any unauthorized release or disclosure;

(iii) The Contractor will ensure that the party whose name appears in the legend is notified of the access or use within thirty (30) days of the Contractor's access or use of such data or software;

(iv) The Contractor will enter into a non-disclosure agreement with the party whose name appears in the legend, if required to do so by that party, and that any such non-disclosure agreement will implement the restrictions on the Contractor's use of such data or software as set forth in this clause. The non-disclosure agreement shall not include any additional terms and conditions unless mutually agreed to by the parties to the non-disclosure agreement; and

(v) That a breach of these obligations or restrictions may subject the Contractor to—

(A) Criminal, civil, administrative, and contractual actions in law and equity for penalties, damages, and other appropriate remedies by the United States; and

(B) Civil actions for damages and other appropriate remedies by the party whose name appears in the legend.

(c) *Indemnification and creation of third party beneficiary rights.* The Contractor agrees—

(1) To indemnify and hold harmless the Government, its agents, and employees from every claim or liability, including attorneys fees, court costs, and expenses, arising out of, or in any way related to, the misuse or unauthorized modification, reproduction, release, performance, display, or disclosure of technical data or computer software received from the Government with restrictive legends by the Contractor or any person to whom the Contractor has released or disclosed such data or software; and

(2) That the party whose name appears on the restrictive legend, in addition to any other rights it may have, is a third party beneficiary who has the right of direct action against the Contractor, or any person to whom the Contractor has released or disclosed such data or software, for the unauthorized duplication, release, or disclosure of technical data or computer software subject to restrictive legends.

(d) The Contractor shall ensure that its employees are subject to use and non-disclosure obligations consistent with this clause prior to the employees being provided access to or use of any GFI covered by this clause.

(End of clause)

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